Supreme Court, U.S.
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No. 05-882

In The

Supreme Court of the United States

SHEBOYGAN COUNTY DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

Petitioner,

v.

RACHEL B.,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Wisconsin

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the federal Adoption and Safe Families Act of 1997 – enacted for the express purpose of promoting the adoption of children in foster care, and tying federal foster care funding incentives to the states' implementation of conforming statutes – preempts the application of a Wisconsin law serving to retroactively strip the trial court of competency to hear and decide a TPR case for a technical violation of a time limit statute.

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OPINION BELOW

The opinion of the Supreme Court of Wisconsin is found in *Sheboygan County Dept. of Social Services v. Matthew S. and Rachel B.* at 282 Wis.2d 150, 698 N.W.2d 631 (June 22, 2005). The opinion is reproduced at Appendix 1.

JURISDICTION

The opinion of the Supreme Court of Wisconsin reversing the Wisconsin Court of Appeals decision below, was entered on June 22, 2005. The Supreme Court of Wisconsin is the court of last resort in Wisconsin. The question of whether Congressional intent and national foster care policy set by the federal Adoption and Safe Families Act of 1997 were at odds with the ruling of the Supreme Court of Wisconsin was presented to Wisconsin's high court in the Petitioner's Motion for Reconsideration and denied on October 17, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a) on the claim that the Wisconsin law is in direct conflict with a law of the United States. Pursuant to Rules 14.1(e)(v) and 29(3)(c) of the Supreme Court of the United States, the requirements of 28 U.S.C. § 2403(b) may apply in this case. Three copies of this Petition for Writ of Certiorari will therefore be served on the Attorney General for the State of Wisconsin.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United State Constitution, Article VI, cl.2:

This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

42 U.S.C. § 671(a)(15)(D)(i). "State plan for foster care and adoption assistance."

(a) Requisite features of State plan. In order for a State to be eligible for payments under this part [42 USCS §§ 670 et seq.], it shall have a plan approved by the Secretary which –

(15) provides that –

(D) reasonable efforts of the type described in subparagraph (B) shall not be required to be made with respect to a parent of a child if a court of competent jurisdiction has determined that –

(i) the parent has subjected the child to aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse);

42 U.S.C. § 673b(d)(1). "Adoption incentive payments."

(d) Adoption incentive payment.

(1) In general. Except as provided in paragraph (2), the adoption incentive payment payable

to a State for a fiscal year under this section shall be equal to the sum of –

(A) $ 4,000, multiplied by the amount (if any) by which the number of foster child adoptions in the State during the fiscal year exceeds the base number of foster child adoptions for the State for the fiscal year;

(B) $ 2,000, multiplied by the amount (if any) by which the number of special needs adoptions that are not older child adoptions in the State during the fiscal year exceeds the base number of special needs adoptions that are not older child adoptions for the State for the fiscal year; and

(C) $ 4,000, multiplied by the amount (if any) by which the number of older child adoptions in the State during the fiscal year exceeds the base number of older child adoptions for the State for the fiscal year.

42 U.S.C. § 675(5)(E). "Definitions."

(5) The term "case review system" means a procedure for assuring that –

(E) in the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months, or, if a court of competent jurisdiction has determined a child to be an abandoned infant (as defined under State law) or has made a determination that the parent has committed murder of another child of the parent, committed voluntary manslaughter of another child of the parent, aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter, or committed a felony assault that has resulted in

serious bodily injury to the child or to another child of the parent, the State shall file a petition to terminate the parental rights of the child's parents (or, if such a petition has been filed by another party, seek to be joined as a party to the petition), and, concurrently, to identify, recruit, process, and approve a qualified family for an adoption, unless –

(i) at the option of the State, the child is being cared for by a relative;

(ii) a State agency has documented in the case plan (which shall be available for court review) a compelling reason for determining that filing such a petition would not be in the best interests of the child; or

(iii) the State has not provided to the family of the child, consistent with the time period in the State case plan, such services as the State deems necessary for the safe return of the child to the child's home, if reasonable efforts of the type described in section 471(a)(15)(B)(ii) [42 USCS § 671(a)(15)(B)(ii)] are required to be made with respect to the child;

Wis. Stat. § 48.315, Delays, Continuances and Extensions.

(2) A continuance shall be granted by the court only upon a showing of good cause in open court or during a telephone conference under s. 807.13 on the record and only for so long as it is necessary, taking into account the request or consent of the district attorney or the parties and the interest of the public in the prompt disposition of cases.

Wis. Stat. § 48.417, Petition for termination of parental rights; when required.

(1) FILING OR JOINING IN THE PETITION; WHEN REQUIRED. Subject to sub. (2), an agency or the district attorney, corporation counsel or other appropriate official designated under s. 48.09 shall file a petition under s. 48.42(1) to terminate the parental rights of a parent or the parents of a child, or, if a petition under s. 48.42(1) to terminate those parental rights has already been filed, the agency, district attorney, corporation counsel or other appropriate agency shall join in the petition, if any of the following circumstances apply:

> (a) The child has been placed outside of his or her home, as described in s. 48.365(1) or 938.365(1), for 15 of the most recent 22 months, not including any period during which the child was a runaway from the out-of-home placement or the first 6 months of any period during which the child was returned to his or her home for a trial home visit. If the circumstances specified in this paragraph apply, the petition shall be filed or joined in by the last day of the 15th month, as described in this paragraph, for which the child was placed outside of his or her home.

STATEMENT OF THE CASE

Joshua J.S., born October 10, 2001, is the biological son of Matthew S. and Rachel B. He was placed in foster care at birth because Matthew had previously abused another of Rachel's children, Joshua's half-brother. A Wisconsin court determined that Joshua was found to be a child in need of protection and services when he was less

than two months old. Joshua has never lived at home with Rachel.

The court required Rachel to meet a number of conditions before Joshua could be returned to her. These conditions included that she be truthful and forthright with information to the social worker and service providers; maintain employment; explore issues of co-dependency and dependency and understand the need for self-sufficiency; demonstrate that she could protect her children and prioritize their needs over others; share her residence only with persons pre-approved by the assigned social worker; and establish and maintain an independent, suitable residence with sufficient food, clothing, bedding, adequate furniture and adequate supervision to meet Joshua's needs.

Fifteen months after the court's order setting these conditions – as required by a Wisconsin statute[1] enacted to conform with the federal Adoption and Safe Families Act of 1997 – the Department filed a petition to terminate both Matthew's and Rachel's parental rights based on a continuing need for protection and services under Wis. Stat. § 48.415(2). The Department alleged that Rachel had violated the above-mentioned court orders by lying about the number of times she had worked as an exotic dancer; lying about looking for work when she was on Huber release from the Sheboygan County jail; failing to consistently follow through with counseling on a regular basis; being unable to demonstrate the ability to protect her children and act in their best interest; and failing to establish a proper residence needed for Joshua's return.

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[1] Wis. Stat. § 48.417(1)(a).

Rachel's and Matthew's fact-finding hearings were severed, and after a three-day fact-finding hearing, a jury found that grounds existed for terminating Rachel's parental rights on the basis of a continuing need for protection and services. Rachel's and Matthew's parental rights were terminated on October 30, 2003, and guardianship and custody of Joshua were transferred to the State Department of Health and Family Services.

Rachel appealed the decision on the ground that the circuit court lost competency to proceed by technically violating a statutory requirement governing time limits for hearing the case. It is undisputed that the trial court granted otherwise valid continuances in the case to accommodate both its calendar and the turnover in Rachel's three attorneys. However, the trial court failed to timely grant the first of these continuances "in open court" as required by the language of the state statute.[2]

The Wisconsin Court of Appeals ruled that Rachel had effectively waived her right to bring this argument by not raising it first in the trial court. (App. 44) A sharply divided Wisconsin Supreme Court reversed the Court of Appeals, a majority of four justices holding that a challenge to competency could not be waived, and noting that "children such as Joshua S., and their parents, clearly have a due process right" to have their cases governed by the state time limits statute. (App. 20) The three dissenting justices maintained that this decision was wrong because it failed to make the child's best interest paramount, as required by state law. (App. 23) The Department filed a Motion for Reconsideration, arguing that

[2] Wis. Stat. § 48.315(2).